# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>July 11, 2000 |
| v | No. 218026<br>Calhoun Circuit Court |
| HAROLD BRUCE STOUTEN,<br><br>Defendant-Appellant. | LC No. 98-004048-FC |

Before: Gage, P.J., and Gribbs and Sawyer, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3). He was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to a term of 9 to 22-1/2 years' imprisonment. He appeals as of right. We affirm.

Defendant's convictions arise from his alleged sexual assault of an eight-year-old child, who was living in the house where defendant resided as a tenant.

Defendant claims that he was denied a fair trial because the prosecutor improperly vouched for the credibility of her witnesses. We disagree. A prosecutor may not vouch for the credibility of a witness by suggesting that the government has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 Mich 659 (1995).

Here, the victim's mother's opinion testimony referring to both the victim's and the victim's brother's character for truthfulness was properly admitted pursuant to MRE 608(a). Further, by offering such testimony, the prosecutor did not improperly vouch for the credibility of the witnesses.

Defendant also contends that improper vouching occurred when the police officer who questioned the victim was permitted to testify that she did not pressure the victim about what to say, that she did not lead the victim during her statement, and that the victim's mother gave no indication that the victim had been coached, pressured or told what to say. At trial, defendant objected to this testimony only on the basis of relevancy, not on the basis that it amounted to impermissible vouching. An objection

based on one ground is insufficient to preserve an appellate attack based on a different ground. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Regardless, the testimony did not amount to impermissible vouching and was relevant to show the circumstances under which the victim's statements were made. Thus, no error occurred. Likewise, improper vouching did not occur when a police officer was permitted to testify that the police were "very specific" about separating the children during questioning. Compare *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998).

Next, defendant claims that he was denied his right to due process when the prosecutor elicited that he had remained silent upon being advised that the police were conducting a criminal sexual conduct investigation. We disagree. A defendant's failure to deny an accusation may not be used as substantive evidence of the defendant's guilt. *People v Hackett*, 460 Mich 202, 213; 596 NW2d 107 (1999), citing *People v Bigge*, 288 Mich 417; 285 NW 5 (1939). However, when the silence does not occur in the face of an accusation, the rule of *Bigge* is not implicated. *Hackett, supra* at 215. Similarly, this Court has held that when a defendant's silence or non-responsive conduct does not occur during a custodial interrogation situation or in reliance on *Miranda*[1] warnings, it is not constitutionally protected and may be admitted as substantive evidence. *People v Schollaert*, 194 Mich App 158, 165-167; 486 NW2d 312 (1992). See also, *People v Dunham*, 220 Mich App 268, 274; 559 NW2d 360 (1996).

Here, we find that defendant's silence was not constitutionally protected. Defendant was not in a custodial interrogation situation, and he had not been arrested, accused or been given his *Miranda* rights. Thus, the trial court did not err in permitting the prosecutor to elicit the challenged testimony. *Hackett, supra*; *Schollaert, supra*.

Next, defendant claims that he was deprived of his right to due process because inadmissible hearsay testimony was admitted when the victim's mother was permitted to testify about what the victim had said to her on the morning after the charged offense. We disagree. The decision whether to admit or exclude evidence is within the trial court's discretion. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997). Hearsay evidence is not admissible at trial unless it falls within an established exception. The exceptions to the hearsay rule are justified by the belief that the hearsay statements are both necessary and inherently trustworthy. *McCallum v Dep't of Corrections*, 197 Mich App 589, 603; 496 NW2d 361 (1992).

The victim's mother's testimony was admitted under MRE 803A, which provides:

> A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
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> (1) the declarant was under the age of ten when the statement was made;

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

(2) the statement is shown to have been spontaneous and without indication of manufacture;

(3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and

(4) the statement is introduced through the testimony of someone other than the declarant.

If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.

A statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.

This rule applies in criminal and delinquency proceedings only.

The record discloses that a proper foundation was established for admitting the victim's statements to her mother under MRE 803A. The testimony corroborated testimony already given by the victim, who was under the age of ten when the statements were made. There was no indication of manufacture. Also, the minimal delay in making the statements was excusable, given that the charged incident occurred in the middle of the night and the victim was fearful of defendant, whose room was adjacent to her parents' bedroom. *Dunham*, *supra* at 271-273; *People v Hammons*, 210 Mich App 554, 558; 534 NW2d 183 (1995). Thus, the trial court did not abuse its discretion in admitting the testimony.

Next, defendant contends that his due process rights were violated when evidence of prior bad acts was introduced at trial. We disagree. Defendant challenges the admissibility of a police officer's testimony indicating that the victim described three separate occurrences of sexual assault, and the victim's testimony about unrelated sexual conduct by defendant. We conclude that the evidence was properly admitted under MRE 404(b). *People v Starr,* 457 Mich 490, 501-502; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994); *People v Layher*, 238 Mich App 573, 585-586; ___ NW2d ___ (1999), quoting *People v Sabin*, 223 Mich App 530, 533; 566 NW2d 677 (1997). As this Court observed in *Layher*, *supra*, the testimony was admissible to negate any claim that the charges were groundless and had been fabricated by the victim.

Finally, there is no merit to defendant's claim that the trial court's failure to sua sponte instruct the jury on third- or fourth-degree criminal sexual conduct deprived him of a fair trial. The duty of the trial court to instruct with regard to lesser included offenses is determined by the evidence. *People v Torres (On Remand),* 222 Mich App 411, 416; 564 NW2d 149 (1997). Third-degree criminal sexual

conduct requires sexual penetration. MCL 750.520d(1); MSA 28.788(4)(1). Because there was no evidence of sexual penetration, an instruction on third-degree CSC was not warranted. Fourth-degree CSC requires that the victim be at least thirteen years of age. MCL 750.520e(1)(a); MSA 28.788(5)(1)(a). Because there was no evidence suggesting that the victim was anything other than eight years of age when the offense was committed, an instruction on fourth-degree CSC was likewise unwarranted.

Affirmed.

/s/ Hilda R. Gage
/s/ Roman S. Gribbs
/s/ David H. Sawyer